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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re C.P. a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MICHAEL P.,

Defendant and Appellant.

D075591

(Super. Ct. No. NJ14191D)

APPEAL from an order of the Superior Court of San Diego County, Michael Imhoff, Commissioner. Affirmed.

Michelle E. Butler, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Tahra Broderson, Senior Deputy County Counsel, for Plaintiff and Respondent.

Michael P. (Father) appeals the juvenile court's order denying him reunification services with respect to his minor son, C.P., under Welfare and Institutions Code section 361.5, subdivision (e)(1).¹ Father contends there was no substantial evidence to support the court's finding that providing reunification services to him would be detrimental to C.P. We disagree and affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Detention*

C.P. was born in June 2007 to Father and P.S. (Mother). They had two older children, P.P. and M.P., and a younger child, H.P. The San Diego County Health and Human Services Agency (the Agency) opened a juvenile dependency case for C.P. in October 2018, after he was apprehended trying to shoplift and reported he was trying to get money for a hotel. Mother was with C.P. at the store, but left when he was detained and later explained she was afraid law enforcement would take her car.

The Agency filed a petition on C.P.'s behalf under section 300, subdivision (b)(1), on the grounds that he was destitute because Mother was not providing for him, citing her abandonment of him after he was arrested for stealing to obtain money for shelter. The petition further alleged C.P. was impoverished due to parental substance abuse and criminal history, noting Mother had extensive substance abuse history and Father was incarcerated.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated. C.P.'s mother does not appeal.

Social worker Laura Cardona provided the detention report. It indicated Father had been incarcerated since August 2017, and was eligible for parole in April 2020.² Mother said she asked him to leave around six months before his last arrest, and they were not in a relationship. She also said C.P. and Father "used to be really close," but when Mother asked Father to leave, "he never contacted the family again." C.P. told Cardona that he and Mother stay in hotels. When asked if he had a wish, he said "a nice house," with Mother and his siblings.

The report included the family's child welfare history. H.P. was born addicted to methamphetamine, and parental rights were terminated in August 2010. Another case was opened in 2012 and 2013 for C.P. and the two older children, arising from Mother's substance abuse and inadequate supervision. Jurisdiction was terminated, and Mother received custody. There was also a case before C.P.'s birth, involving Mother's drug use.

At the detention hearing, the juvenile court detained C.P., and submitted an order for Father to be produced for the next hearing.

II. Jurisdiction

Cardona provided the jurisdiction/disposition report in December 2018. Mother reported that she and Father "used together toward the end." Cardona asked C.P. how he felt about Father being at court, and he responded, "fine." He said he would like a visit with Father, but "it [was] okay" if he did not have one, and asked if he could write him letters. C.P. also said he would like to see Mother more often and asked for an overnight

² Inmate locator search results were attached to the report.

visit. The report contained Father's criminal history, which spanned nearly 20 years, had charges including drug possession and burglary, and reflected multiple periods of incarceration. His current incarceration was for vehicle theft.

The Agency recommended denying services to Father under section 361.5, subdivision (e)(1). The report indicated this was based on Father's incarceration, noting he would be in prison until April 2020, "more than a year from the date [C.P.] was taken into custody." The assessment section of the report stated the "family [had] an extensive history of substance abuse, participation in criminal activity, exposure to violence, and child welfare involvement," and it was "evident that [C.P.] has been affected by all of the past and current trauma in the family."

Father was present at the jurisdiction hearing that month. C.P.'s counsel stated he was open to visits. The court ordered visitation, and said C.P. was free to correspond with Father through the mail. The court also said: "I would encourage the father to participate or sign up in any 12-step, educational or vocational programs at your facility pending the next hearing. If you do so, please document your efforts. Share that with the social worker so you get full credit."

III. Disposition

The Agency prepared addendum reports in January and February 2019.

The January report reflected Cardona met with Father. He started using alcohol and marijuana at a young age, and his primary issue now was heroin. He had attended treatment " 'more out of have to than want to,' " and "most of his clean time" was while incarcerated. He reported accomplishments during the past five years that he was not

incarcerated, including obtaining a driver's license, attending parent/teacher conferences, picking up the children from school, and seeing his daughter graduate from high school.

Father stated the last time he saw C.P. was May or June of 2017. He wanted his children to know he loved them, and they could count on him. He also wanted the court to know he came "from a good place and want[ed] the best for [his] kids and that [he's] sorry." When asked about the environment C.P. needed for the Agency to no longer be involved, Father described a "sober living environment with stable housing, and being responsible with work or school." He also indicated this involved "having 'healthy people around,' " which meant avoiding negative influences. He did not want to return to the same neighborhood.

Cardona stated Father was "encouraged to enroll in as many services as are available at his facility." He was also encouraged to speak with his attorney about his release date and steps he should take if released earlier.

The February addendum report indicated Father believed he would be released early, because he "qualifie[d] for the 'MCRP' program and [was] a 'half-timer,' " but he did not know the day he would be released. He was participating in NA (i.e. Narcotics Anonymous), school, and self-help groups, and said this could take up to 12 weeks off his time each year. Cardona told Father that to change her recommendation, she would need verification from the facility that his release date changed, and Father did not believe she would get it.

Father was having weekly visits with C.P., and there had been no concerns. C.P.'s caregiver reported he "talk[ed] very positively about his father and the visits." Father was

enjoying them and said they were going well. He promised C.P. he was "not going to allow this situation to happen again," recognizing this was a "heavy promise[]" and promises could be "damaging if they are not followed through." Father stated he was committed to changing his life and being a support for his children. He believed he would be required to attend a program upon release from prison, which would provide a safe place to stay, and discussed with Cardona the importance of having a positive support network.

Cardona spoke with the prison counseling department about Father's release date and the possibility of it changing. The counselor asked her to fax a letter with questions and stated "it would depend on court cases and a lot of other variables." When Cardona asked about services at the facility, the counselor indicated they had programs to earn a GED and college degrees, skill-based programs, and NA and AA (i.e. Alcoholics Anonymous); that the educational department could provide more information; and to include this information in the faxed request. Cardona sent the fax, and subsequently spoke with the counselor again. The counselor received the request, but had to consult with different departments and could not provide additional information at that time.

The Agency continued to recommend no services. It noted that while Father stated "a commitment to being a positive example to his children and living a life that is free from substance abuse and criminal activity, he [was] not able to demonstrate this commitment in the community due to his current sentence."

In February 2019, the court held a contested disposition hearing, and accepted the Agency reports into evidence. Father did not present affirmative evidence. C.P.'s

attorney indicated C.P. had "a lot of concern . . . with his father," and he enjoyed visits, but she agreed with the recommendation to deny services.

The juvenile court denied reunification services to Father, stating it was "required to do a balancing under [section 361.5, subdivision](e)(1), and this is probably one of the more difficult balances that I have confronted."

The court first addressed C.P.: "[C.P.] is an 11-year-old young man. He's been very clear that he wants to have a relationship with his father. He is clear that he's frustrated that his father hasn't always been available for him when he needed guidance from his father." The court acknowledged Father's motivation to "turn his life around," and thought C.P. "could learn a lot from his father if his father does follow through and comes out of incarceration and is truly there for his son."

Next, the court considered "the length of time for the father to be incarcerated," stating the 18-month review would be in April 2020, which was around the time of his anticipated release. The court acknowledged Father felt he might get out earlier, but observed it was difficult to get a definitive response from the Department of Corrections, and the social worker had "done an exemplary job in trying to clarify that." The court concluded that "on this record, . . . April of 2020 is the most accurate contextual point for us to consider."

The court then explained that while Father's "head and his attitude [were] in [the] right place," it had "taken into account the fact that the services [he] would need would really be intensive substance abuse assistance." It noted the record showed Mother and Father used together, and would need assistance to avoid derailing one another's progress.

The court determined it had "no evidence before [it] that that type of intensive treatment would be available during the time of the father's incarceration."

The court concluded the Agency "carried its burden under . . . 361.5(e)(1)." It stated that if Father continued to follow through with his programs, and had a release date earlier than April 2020, it would "certainly encourage [him] to file a 388 motion" and "[t]he court would reconsider at that point in time." The court ordered liberal supervised visitation, and incorporated the recommendations in the disposition report, making all findings by clear and convincing evidence.

The court's minute order stated, "Pursuant to section 361.5(e)(1) of the Welfare and Institutions Code, there is clear and convincing evidence the provision of reunification services to the incarcerated . . . father would be detrimental to the child, and therefore no reunification services shall be provided." The court granted reunification services for Mother. Father timely appealed.

DISCUSSION

Father's sole argument on appeal is that the juvenile court erred in denying him reunification services. This argument lacks merit.

I. *Legal Principles*

Under section 361.5, "the juvenile court generally must order reunification services to assist the parent to rectify the problems that led to removal." (*In re Lana S.* (2012) 207 Cal.App.4th 94, 106; see *In re Alanna A.* (2005) 135 Cal.App.4th 555, 563 ["reunification services play a 'crucial role' in dependency proceedings]; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 ["There is no 'Go to jail, lose your child' rule in California."].)

Services are provided for 12 months after the child enters foster care, for a child three years of age or older. (§ 361.5, subd. (a)(1)(A).) Services can be extended for up to 18 months where there is a substantial probability the minor will be returned within the extended period, and up to 24 months in limited circumstances. (§ 366.21, subd. (g)(1), § 366.22, subd. (b); § 361.5, subds. (a)(3)(A), (a)(4)(A).)³

If the parent is incarcerated, "the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." (§ 361.5, subd. (e)(1).) The statute provides that in determining detriment:

"[T]he court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration, institutionalization, or detention within the reunification time limitations described in subdivision (a), and any other appropriate factors." (*Ibid.*)

We review an order denying reunification services for substantial evidence.

(*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) On substantial evidence review, "we draw all reasonable inferences in support of the findings, view the record

³ (See § 366.21, subd. (g)(1) [case can be continued up to 18 months where there is "substantial probability" child will be returned during period (or reasonable services were not provided), with probability based on regular contact, "significant progress" in resolving problems leading to removal; and parent's capacity to complete objectives of treatment plan]; § 366.22, subd. (b) [continuation up to 24 months when child's best interest is met by providing more services to parent in court-ordered residential substance abuse treatment program; who was a minor or dependent; or recently discharged from incarceration, where there is substantial probability of return or lack of reasonable services]; § 361.5, subds. (a)(3)(A), (a)(4)(A) [extension of services during continuation periods, consistent with §§ 366.21 & 366.22].)

most favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

II. *Analysis*

There is substantial evidence for the order denying reunification services to Father. The juvenile court found there was clear and convincing evidence that ordering services would be detrimental to C.P. It determined Father would not be released until April 2020, around the time of an 18-month hearing. It noted his need for intensive substance abuse treatment, and the lack of evidence he could receive such treatment in prison. And it acknowledged C.P. wanted a relationship with Father and could benefit from his presence if he turned his life around, but also that C.P. was frustrated Father had not always been available for him. These findings focus on relevant considerations in section 361.5, subdivision (e)(1), and the record supports them.

First, the evidence reflected Father would not be out of prison before April 2020, meaning he would not be released during the initial 12-month reunification period (but only at around 18 months, which would require continuation of that period). While Father believed he might be released early, and the Agency investigated this possibility, there was no evidence to support earlier release as of the disposition hearing.

There was also evidence Father needed intensive substance abuse treatment, and no indication he could obtain it in prison. He objects that he was not assessed for services, and the court just assumed he needed such treatment. But the record showed he

had a long history of using alcohol and drugs, including heroin; he primarily stayed sober in prison; and he and Mother used together. Father also contends there was incomplete information about the programs at his facility. Although the social worker was unable to obtain follow-up details, she did obtain program information. Father does not establish a lack of evidence for the court's findings in this regard.

Lastly, the evidence showed that while C.P. and Father had been close in the past, they had only begun to reconnect and there was little certainty Father could make the changes necessary to be a positive presence in C.P.'s life. Until the dependency case, Father last saw C.P. in May or June 2017. Mother was caring for him, and his comments reflected he was more bonded with her (including expressing a desire for a home with Mother and his siblings). Father was participating in programs, but he had a long history of serious criminal activity and substance abuse that placed C.P. at risk and which he would only be starting to address. He even acknowledged that promising C.P. he would "not allow this situation to happen again" could "be damaging" if not upheld.

The juvenile court could reasonably conclude that providing reunification services to Father would be detrimental to C.P.

Father offers several other arguments for reversal, and none are persuasive. As a preliminary matter, he contends that a detriment finding "should be the exception" and that courts "have upheld . . . the finding of detriment in extreme circumstances where there was evidence of how providing services would be detrimental." There is no question reunification services are favored, including for incarcerated parents. But while the cases Father cites involve extreme facts, section 361.5, subdivision (e), does not

require them. (Compare *In re Alexis M.* (1997) 54 Cal.App.4th 848, 853 [father was in prison for the "death of another child from child abuse"], and *Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13, 19 (*Edgar O.*) [father murdered mother], with, e.g., *In re James C.* (2002) 104 Cal.App.4th 470, 485-486 [father had no relationship with children; had been convicted of several felonies; and release would occur after reunification period].)

Turning to the rest of Father's arguments, he first contends the Agency improperly assumed, and the juvenile court incorrectly ruled, that detriment could be based solely on the length of incarceration. Although the Agency cited Father's incarceration period as the basis for its recommendation to deny services, its reports addressed other relevant issues, including Father's substance abuse and his lack of recent presence in C.P.'s life. As for the court, it did not find detriment only due to the incarceration period and there was substantial evidence for its findings. The cases that Father cites regarding denial of services based on a single factor are thus distinguishable. (See *In re Dylan T.* (1998) 65 Cal.App.4th 765, 767 [detriment cannot be based on minor's age, without other evidence]; *Jonathan M.* (1997) 53 Cal.App.4th 1234, 1236-1238 [juvenile court improperly focused on geographic distance alone], disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396].)

Second, Father argues that "while the court technically made a detriment finding," that finding was improperly based on "the perceived futility of offering services to Father based on his reported sentence length and the availability of services at his facility,"

citing *In re Kevin N.* (2007) 148 Cal.App.4th 1339 (*Kevin N.*).⁴ Section 361.5, subdivision (e), identifies the "length of the sentence" as a factor in the detriment analysis, so considering it was plainly appropriate. To the extent the court's concerns regarding Father's ability to obtain substance abuse treatment could be viewed as "consider[ing] the . . . futility of offering services," Father establishes no error in doing so. The statute provides for consideration of "other appropriate factors," and does not dictate the factors on which the court must focus. (See *Edgar O.*, *supra*, 84 Cal.App.4th at p. 18 [§ 361.5, subd. (e)(1) "does not require that each listed factor exist . . . , nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not"].) Father's lack of access to adequate substance abuse services reasonably bears on the issue of detriment to C.P.

Kevin N. also does not aid Father. There, the Court of Appeal reversed an order denying reunification services to an incarcerated parent, because the juvenile court misread the applicable time limit for services and failed to consider detriment. (*Kevin N.*, *supra*, 148 Cal.App.4th at pp. 1343-1345.) The Court of Appeal rejected the agency's argument that the juvenile court "found services would be detrimental when it labeled

⁴ On reply, Father contends the juvenile court failed to expressly make a detriment finding by stating it only in the minute order, citing *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254. Even if we considered this belated argument, it lacks merit. In *Jennifer T.*, the juvenile court was statutorily required to provide oral notice of writ procedures and stated in its order that it did so, but the transcript showed it did not. (*Id.* at p. 259.) Given the conflict, the reviewing court presumed the transcript was more accurate. (*Ibid.*) Here, Father identifies no authority requiring the detriment finding to be stated at the hearing, and there is no comparable conflict.

them as futile," but did not hold that considering futility as part of a larger detriment analysis was improper.⁵

Third, Father contends the juvenile court "improperly considered the availability of programs at Father's facility," because under section 361.5, subdivision (e)(1), this is "a factor in determining the content of that parent's case plan, not whether that parent is to receive services." (See § 361.5, subd. (e)(1) [in "determining the content of reasonable services," court shall consider "particular barriers" to incarcerated parent's access to services].) But, again, the statute provides for consideration of "other appropriate factors" in assessing detriment. A juvenile court could consider available programs at that stage, and then consider them again if it orders services and must determine their content.

Fourth, Father contends the trial court improperly balanced "the pros and cons of [him] receiving services," rather than focusing on whether services would be detrimental to C.P. He notes the court's discussion of what he characterizes as "positive factors" for granting services (such as the potential benefit to C.P. if Father were able to follow through). If Father is suggesting that the existence of positive factors precludes a

⁵ The Agency contends that consideration of futility is supported by *Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018. (*Id.* at pp. 1022, 1030-1031 [denying writ petition challenging termination of services; agreeing with treatise that when "the 'provision of . . . services has little or no likelihood of success and thus only serves to delay stability . . . providing services to the incarcerated parent [may] be detrimental"], citing Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2018) § 2.129 [2][b][pp. 2-390-2-391.] Father contends *Fabian's* comments were dicta, and the case is distinguishable. Notwithstanding any lack of precedential value or supposed factual distinctions, its reasoning is consistent with the conclusion that the availability of services may be pertinent to the detriment analysis.

detriment finding, we disagree. The statute sets forth multiple issues for consideration. The juvenile court could properly balance them, including those favoring services, and still conclude services would be detrimental.

Fifth, Father contends the evidence showed that services would be beneficial to C.P. and it would be detrimental to him if services were denied. He contends, *inter alia*, that he and C.P. were bonded; he was participating in programs and committed to providing C.P. with a stable home; he was potentially eligible for early release; and Mother was participating in services, so ordering services for him would not delay permanency (and would be in C.P.'s interest, as Father was likely to remain in his life). These arguments amount to a request to reweigh the evidence, which we may not do. (*In re I.J.* (2013) 56 Cal.4th 766, 773 [on substantial evidence review, "[w]e do not reweigh the evidence . . . , but merely determine if there are sufficient facts to support the findings of the trial court].)

Finally, Father argues the juvenile court improperly delegated to him the Agency's responsibility to identify services for an incarcerated parent, by tasking him with finding programs and filing a section 388 motion on release. He cites *In re Monica C.* (1995) 31 Cal.App.4th 296 and *In re: Elizabeth R.* (1995) 35 Cal.App.4th 1774. Father's reliance on these cases is misplaced, as they involved the reasonableness of reunification services; here, services were denied. (*Monica, supra*, at pp. 300, 307-307 [unreasonable for services plan to require the incarcerated parent to identify programs]; *Elizabeth R., supra*, at p. 1791 [little evidence regarding department efforts to facilitate visitation for parent hospitalized for mental illness].) In any event, Father's criticisms lack merit. Both the

court and Agency encouraged Father to participate in programs, and the Agency tried to obtain additional information about them. As for the court's discussion of a section 388 motion, it was encouraging Father to continue making progress—and indicating that if he did so, and was released early, it would reconsider services. We decline to find error in offering such encouragement.⁶

We conclude Father does not establish the trial court erred in denying him reunification services.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

⁶ Father relies on another case involving reasonableness of services, *In re Brittney S.* (1993) 17 Cal.App.4th 1399, to contend that by not ordering visitation in a case plan, the court denied him and C.P. "appropriate recourse if those visitation orders are not followed." Although failure to provide visitation can render services unreasonable (*id.* at p. 1407), it does not follow that the possibility of enforcing visitation justifies services when they are otherwise detrimental.